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U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

AUG 02 2004

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

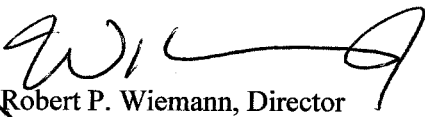
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The Director, California Service Center, denied the employment-based petition on July 16, 2003. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in June 1998. It invests in and develops real estate. It seeks to employ the beneficiary as its vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary's assignment would be primarily managerial or executive. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered annual wage of \$20,800.

On appeal, counsel for the petitioner disagrees with the director's determination.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner established that the beneficiary's assignment would be in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter submitted with the petition, the petitioner stated:

In the capacity of Vice President, [the beneficiary] has total control over the day-to-day operation of [the petitioner]. She has direct supervision over all projects, [the] Project Manager reported the progress of the project to [the beneficiary], and [the beneficiary] evaluated his performance. She has the authority to hire, promote, or fire her subordinates. With the general guidance from the President, [the beneficiary] oversees the construction bidding and loan arrangement process, and has the authority to make final decisions on these matters. She reviews and approves accounting and financial documents. She also develops and implements the sales/marketing programs. She is the only managerial personnel transferred from China to oversee the Chinese company's investment. And she is required to report the business progress and financial position of the U.S. subsidiary to the President stationed in China and the board of directors of the parent company.

While phase one of the construction project is nearly completed, [the beneficiary] will be responsible for the smooth completion of phase one and carry out the rest of the construction project. She reports to the general manager and the board of the new parent company.

The petitioner also submitted an information sheet showing that the petitioner owned the property depicted on a plat and listing the name and address of the project manager of the property being developed.

The director requested further evidence including: (1) the petitioner's organizational chart as of the date of filing the petition; (2) a brief description of the job duties and educational levels of all employees under the beneficiary's supervision; (3) a more detailed description of the beneficiary's job duties including the approximate percentage of time the beneficiary spent on each of the listed duties; and (4) the source of remuneration of all employees.

In response, the petitioner provided an organizational chart that showed an accounting department contractor, a project manager, and a sales/marketing contractor. The organizational chart showed the beneficiary in the position of vice-president and as the sole employee in the department of administration. The organizational chart showed that the project manager supervised an architect, engineers, and an on site supervisor. In addition, the petitioner indicated that the project manager was responsible for hiring and discharging the individuals under his supervision and was responsible for obtaining necessary permits, and for the timely completion of all phases of the construction. The petitioner indicated that the project manager was compensated \$5,000 to \$7,500 per month and would have received approximately \$300,000 when the project was finished.

Counsel for the petitioner added that the petitioner's president was often away and that the beneficiary "is in charge of the entire company most of the times [sic]." Counsel added that the beneficiary arranged for the original and renewed construction loans, arranged for the contracts of the project manager and on site supervisor, was responsible for the \$2,000,000 budget, and for the timely completion of each project phase. Counsel indicated the beneficiary had the additional duty of identifying new investment opportunities. Counsel concluded by indicating:

She is responsible for the hiring and discharge of all managerial and non-managerial employees when it is necessary. She is responsible for all day-to-day operation, personnel, and fiscal decisions of the U.S. business. As the highest ranked officer in the United States, [the beneficiary] receives no direct supervision in the United States. She receives assistance from the professionals that she has hired locally, and reports by telephone to the president and to the foreign company.

Counsel declined to break down the beneficiary's day into time allotments as "[the beneficiary's] time is spent on different tasks and taking care of different matters from day to day."

The director determined that: (1) the beneficiary's job description did not establish that the beneficiary would be employed primarily in a managerial or executive capacity; (2) the beneficiary as the petitioner's sole employee would also be responsible for the petitioner's non-managerial and day-to-day tasks; and, (3) the petitioner had not established that the beneficiary would be a functional manager.

On appeal, counsel for the petitioner asserts that the beneficiary supervises all subcontractors who in turn supervise their own crew. Counsel claims that the beneficiary hired and determined the compensation of each of the professionals involved in the project as well as approved each of the project expenditures. Counsel asserts that the beneficiary's duties fulfill the criteria of both managerial and executive capacity. Counsel observes that the beneficiary manages the entire operation; supervises and controls the work of professionals and the project manager who supervises the construction crew; hires and fires all subcontracting professionals and functions at a senior level within the organizational hierarchy; and, exercises direction over the day-to-day operations of the activity or function for which she has authority. Counsel asserts further that the beneficiary manages the petitioner's functions and does not perform any of the functions.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In this matter the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary has "total control over the day-to-day operation of [the petitioner]" and "direct supervision over all projects," and "authority to hire, promote, or fire her subordinates." These statements paraphrase elements of the definition of managerial capacity. *See* 101(a)(44)(A)(i), (ii), and (iii) of the Act. Conclusory statements regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra; Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner indicated that the beneficiary "oversees the construction bidding and loan arrangement process," and "reviews and approves accounting and financial documents," and "develops and implements the sales/marketing programs," as well as evaluating the project manager's performance. However, the petitioner does not provide any documentary evidence that the beneficiary's actual daily responsibilities include managerial or executive tasks associated with these activities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in

these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, supra*.

In response to the director's request for evidence, counsel continued to claim that the beneficiary was the individual who arranged for construction loans, and was responsible for the budget and timely completion of each phase of the project. The record, however, does not include any documentary evidence that the beneficiary actually served in the capacity claimed, rather than acting as a conduit between the various subcontractors and the president of the company. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

Likewise on appeal, counsel claims that the beneficiary supervises the subcontractors, hires and determines compensation, and approves project expenditures. However, the record contains no documentation of agreements entered into with the subcontractors, no documentation of the beneficiary's approval of disbursements, and no letters substantiating the beneficiary's authority. The record does not support counsel's assertion that the beneficiary is responsible for and functions at a managerial or executive level for the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In sum, the petitioner has not provided evidence to demonstrate that the beneficiary's assignment is primarily managerial or executive rather than primarily administrative.

Finally of note, the petitioner proffered the beneficiary an annual salary of \$20,800. The project manager receives a salary of \$5,000 to \$7,500 per month. Although the difference in salary is not conclusive evidence that the beneficiary's duties are more administrative than supervisory, such a difference undermines counsel's claim that the beneficiary performs managerial or executive tasks associated with the petitioner's project.

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$20,800.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

When determining the petitioner's ability to pay the proffered wage, AAO will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements issued to the beneficiary show the beneficiary was paid \$18,000 in 2000, in 2001, and in 2002. The petitioner has not established that it had previously paid the beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that [CIS] should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls in November 2002, the AAO must examine the petitioner's tax return for 2002. However, the petitioner submitted only its IRS Form 1120 for calendar year 2000. For information purposes only, the 2000 tax return presents a negative net taxable income of \$14,227. The petitioner could not pay the proffered wage of \$20,800 per year out of this income nor could it pay the additional sum necessary to elevate the beneficiary's compensation to the proffered wage.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Again for information purposes only, the 2000 tax return presents negative \$482,187 in net current assets. The petitioner could not pay the proffered wage of \$20,800 per year out of its negative net current assets nor could it pay the additional sum necessary to elevate the beneficiary's compensation to the proffered wage.

Counsel's claim that the petitioner has not failed to pay the beneficiary a wage for the past three years and that the petitioner has invested over 1.8 million dollars on the project does not overcome the director's decision on this issue. The record does not contain sufficient evidence of the petitioner's viability as of the date of filing the petition to conclude that the petitioner could pay the beneficiary's proffered wage.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's overseas employer. The petitioner states that the beneficiary's foreign employer sold its interest

in the petitioner to an unrelated entity in February 2001, more than a year prior to filing this petition. When the beneficiary's foreign employer sold its interest in the petitioner, the petitioner was no longer an affiliate, subsidiary, or branch of the beneficiary's foreign employer. Eligibility for this visa classification is premised on the beneficiary entering the United States in order to continue to render services to the same employer, or to a subsidiary or affiliate thereof. *See* section 203(b)(1)(C) of the Act. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Further, counsel refers to the president of the petitioner as the president of the beneficiary's foreign employer. The record shows that another individual is the president of the entity that purchased the beneficiary's foreign employer's interest in the petitioner. Counsel's reference to the beneficiary's assumption of responsibility for the petitioner when the petitioner's president is away, presents inherently contradictory evidence when considering the petitioner's actual organizational structure. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

For these additional reasons the petition will not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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